

Digging Into Dems' Letter On Subpoena Secrecy Demands

By **Derek Hahn, Ross Garrett and Ahnna Chu** (October 26, 2026, 2:04 PM EDT)

Federal law enforcement agencies routinely use boilerplate language in their subpoenas — or the cover letters accompanying them — directing companies not to notify the subpoena's ultimate targets, such as the company's customers or others. And oftentimes, these documents imply that disclosure could have legal consequences.

But as two lawmakers recently called out in a formal letter to the U.S. Supreme Court and the U.S. Government Accountability Office, this boilerplate language may not carry the force of law.

On Sept. 1, 2026, Sen. Ron Wyden, D-Ore., and Rep. Pramila Jayapal, D-Wash., wrote a letter to Chief Justice John Roberts and GAO acting Comptroller General Orice W. Brown.[1] The lawmakers asked for an audit of how federal agencies use nondisclosure language in their subpoenas and requested that the Judicial Conference of the United States update subpoena templates to make recipients' rights clearer.

The lawmakers described the problem as "a pervasive, decades-long abuse of authority by federal law enforcement agencies."

Whether or not this inquiry produces reform, their letter raises a question that has long been underexamined: When federal agencies demand silence, do they actually have the authority to compel it?

When the Government Can Legally Require Subpoena Secrecy

As the letter acknowledges, "longstanding federal law [empowers] law enforcement agencies [to] compel companies to turn over customer records" through "administrative, grand jury, and trial subpoenas." None of these require a court's prior approval in the way a traditional warrant does.

But, as the lawmakers argue, those that receive the subpoena — "often third-party companies and service providers — [retain] a First Amendment right to notify their customers of the [government's] demand." This "allow[s] the actual targets of the subpoena[] the opportunity to assert their own legal rights or challenge the demand in court."

Indeed, in the context of grand jury subpoenas, the Federal Rules of Criminal Procedure expressly state



Derek Hahn



Ross Garrett



Ahnna Chu

that there is "[n]o obligation of secrecy" on anyone outside of those listed in Rule 6(e)(2)(B): grand jurors, court personnel, the government's attorney, or certain federal and state regulators. So if the government wants to legally impose silence, as the letter notes, it must either obtain a court-issued nondisclosure order or point to a specific statute that requires silence.

For example, the Financial Institutions Reform, Recovery and Enforcement Act prohibits employees and other agents of financial institutions from notifying customers of certain subpoenas for their records, or anyone else named in the subpoena.[2] And the Right to Financial Privacy Act similarly restricts disclosure of certain grand jury subpoenas issued to financial institutions to any person named in the subpoena.[3]

But both statutes are narrow and sector-specific.

How Federal Agencies Have Used Boilerplate Language in Subpoenas to Pressure Silence

Despite this legal framework, the letter explains that federal agencies routinely embed boilerplate nondisclosure language directly into subpoenas for customer data. This language directs recipients not to notify their customers — or any other outside parties — and implies that speaking up could carry legal consequences.

The letter documents this practice across agencies including the U.S. Department of Justice, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, and U.S. Drug Enforcement Administration.

It further notes that some agencies have softened their language from a command to "a nominal 'request' for secrecy" following court pushback. But the agencies have stopped well short of informing recipients when they have a right to speak about the subpoena.

The letter highlights two occasions on which federal courts took direct issue with this practice.

In its 2011 *U.S. v. Bryant* decision, the U.S. Court of Appeals for the Third Circuit agreed "that 'the Government's practice of placing non-disclosure request on all grand jury subpoenas [was] 'not a good policy,'" and "discouraged [it] moving forward." [4]

And in its 2015 *U.S. v. Gigliotti* decision, the U.S. District Court for the Eastern District of New York found that prosecutors had included a direct command on the face of grand jury subpoenas ordering civilian recipients not to disclose the subpoena's existence. The court held this violated Rule 6(e)(2) of the Federal Rules of Criminal Procedure and "warned that ... 'continued violations could well warrant severe remedies.'" [5]

What Could Change: Proposed Audits and Template Reforms

Wyden and Jayapal asked the GAO to conduct "a comprehensive audit of DOJ, DHS, and their relevant component agencies." The audit would "evaluate internal agency operations and provide formal recommendations" on the scope and use of nondisclosure language in subpoenas.

They also asked the Judicial Conference to modify standard subpoena templates. Specifically, the modified templates would include a clear "disclosure that the subpoena does not impose an obligation of secrecy on the recipient, unless a court" order or statute specifically requires it.

Although there is no current proposal for legislative reform, that also remains a theoretical possibility.

Each of these potential developments carries distinct practical implications. A GAO audit, if it proceeds, would likely surface certain agency-specific practices for the first time. This could create a public record that embarrasses agencies whose internal templates remain noncompliant, and presumably place those agencies under institutional pressure to adopt formal recommendations.

GAO recommendations are not legally binding, but agencies that publicly ignore them risk further congressional scrutiny.

Judicial Conference action on subpoena templates could also produce meaningful change. Under Title 28 of the U.S. Code, Section 331, the Judicial Conference is authorized to "carry on a continuous study of the operation and effect of the general rules of practice and procedure," and it has historically exercised that authority to revise or recommend revisions to standard federal court forms, including subpoena templates.

If standard federal subpoena forms are revised to affirmatively state recipients' rights, that language would appear on the face of every subpoena issued under those templates, making it harder for agencies to obscure what recipients are and are not legally required to do.

That said, as the lawmakers' letter documents, many agencies have already departed from standard templates in favor of their own subpoena formats and cover letters — limiting the practical reach of any template revision.

Still, the effect of such a revision could be significant, particularly if it provides subpoena recipients with a clear basis, on the face of the document, to push back against unfounded secrecy demands.

Legislative reform is potentially the most consequential. Congress could, for example, impose affirmative disclosure requirements on agencies that issue subpoenas with nondisclosure language. More aggressive measures, such as creating a private right of action for subpoena recipients who are coerced into silence without legal authority, are theoretically possible, but would represent a significant departure from current law.

Companies operating in sectors with high subpoena volume should monitor whether this issue attracts legislative attention in the coming months.

What Companies Should Consider

Until the government acts to curb these practices, companies that are likely to receive federal subpoenas may consider the following.

Treat boilerplate nondisclosure language with caution.

The secrecy demands that accompany federal subpoenas may not carry the same legal weight as a court-issued or statutory nondisclosure order. Unless a court has issued such an order or a specific statute requires silence, subpoena recipients may retain a First Amendment right to speak about the subpoena, including notifying customers whose data is being sought.

As the lawmakers' letter documents, agencies have long embedded this language as a matter of routine rather than legal necessity, and courts have at least twice admonished the government for doing so without legal authority.

Review customer notification policies.

For most industries, Congress has not mandated or prohibited customer notification following receipt of a subpoena. Whether and when to notify customers of government demands is a legal, policy, and, at times, reputational-risk question.

Companies that have made public commitments to transparency regarding government data requests, such as through transparency reports or terms of service, should ensure those commitments are consistent with how they actually respond in practice.

A company that discovers after the fact that it could have lawfully notified a customer who later challenges the subpoena may face awkward questions about why it did not.

Consider the broader strategic implications.

While the letter focuses on subpoenas for customer data, the concerns it raises apply more broadly. Scrutiny of how companies respond to government demands continues to grow. Subpoena response decisions, including decisions about third-party notification or public statements, may face greater after-the-fact examination.

Notifying a third party — whether a customer, business partner or other affected person — may prompt that party to seek to quash the subpoena, which may or may not serve the company's interests. Staying silent when the law did not require it may, in some circumstances, carry its own reputational cost.

Neither path should be taken by default, and both should be evaluated as part of any company's overall response strategy.

Weigh the practical risks of defying a government secrecy request.

Even where a nondisclosure demand lacks legal force, companies should carefully consider the practical consequences of disregarding it.

Federal prosecutors and other enforcement officials exercise broad discretion over the scope of their investigations and their charging decisions. A company's decision to notify a customer or other third party — however legally defensible — may be perceived by the government as an effort to obstruct or interfere with an ongoing investigation.

That perception, whether or not well founded, can materially alter the trajectory of the matter: Investigations may become more adversarial and consequently longer and broader in scope, impose greater costs and business disruptions, and carry a heightened risk of adverse public statements or more aggressive enforcement action.

Companies should weigh these practical realities alongside their legal rights when deciding how to respond to a nondisclosure demand that may not be enforceable.

Watch for further developments.

If the GAO proceeds with the requested audit, its recommendations could drive revised agency policies on nondisclosure requests related to subpoenas.

Judicial Conference action on subpoena templates could also affect how those forms communicate recipients' rights.

And any congressional action — whether through affirmative disclosure requirements or other measures — could alter the legal obligations of both agencies and recipients in ways that are difficult to predict.

Any of these outcomes could meaningfully change the legal landscape for companies that receive these demands.

Conclusion

As the lawmakers' letter highlights, federal agencies have used boilerplate nondisclosure language to pressure subpoena recipients into silence. They have done so despite judicial warnings from multiple courts where the practice lacks legal grounding.

The lawmakers call on two of the most significant institutions in the federal legal system to take steps to "ensure that agencies do not abuse their subpoena authorities at the expense of privacy and free speech rights."

Whether through a GAO audit, Judicial Conference template reform, congressional action or other measures, the current framework may soon see a significant overhaul. Meanwhile, companies responding to federal subpoenas should ensure they are aware of their rights and options.

Derek Hahn is a partner, Ross Garrett is counsel and Ahnna Chu is an associate at Crowell & Moring LLP.

Crowell & Moring partner Joshua Robbins contributed to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] https://www.wyden.senate.gov/imo/media/doc/wyden_jayapal_letter_to_gao_and_sctus_on_federal_law_enforcement_non_disclosure_subpeanas.pdf.

[2] 18 U.S.C. § 1510(b)(2).

[3] 12 U.S.C. § 3420(b)(1).

[4] *United States v. Bryant*, 655 F.3d 232, 239 n.4 (3d Cir. 2011).

[5] *United States v. Gigliotti*, No. 15-cr-204 (E.D.N.Y. 2015).